Supreme Court, U.S.
FILED
JAN 31 2003
CLERK

(5)

No. 02-969

In The

Supreme Court of the United States

ROBERT C. KONOP,

Petitioner,

v.

HAWAIIAN AIRLINES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

ROBERT C. KONOP
Petitioner, Pro Se
P.O. Box 5065
Playa del Rey, CA 90293
(310) 305-2837

10 pp

CORPORATE DISCLOSURE STATEMENT

CORRECTION

The Corporate Disclosure Statement previously provided within respondent Hawaiian's *Brief in Opposition*, and as described within the *Petition for Writ of Certiorari*, was incorrect. According to Hawaiian's quarterly 10-Q report, filed with the Securities and Exchange Commission on November 15, 2002, Hawaiian Airlines, Inc. has been restructured. "On August 29, 2002, Hawaiian was restructured into a holding company structure, whereby Hawaiian [Hawaiian Airlines, Inc.] became a wholly owned subsidiary of Hawaiian Holdings, a Delaware corporation."

TABLE OF CONTENTS

	Page
Corporate Disclosure (Correction)	i
Table of Contents	ii
Table of Authorities	iii
Reply Brief Issues	1
Argument	2
A. The Petition Is Not Interlocutory	2
B. The Opposition Assumes Facts	3
Discussion	5
Conclusion	6

TABLE OF AUTHORITIES

Page

CASES:

Bartnicki v. Vopper, 532 U.S. 514 (2001) 5

Konop v. Hawaiian Airlines, Inc., 236 F.3d 1035 (9th Cir. 2001) 2

Steve Jackson Games, Inc. v. United States Secret Serv., 36 F.3d 457 (5th Cir. 1994) 2

United States v. Smith, 155 F.3d 1051 (9th Cir. 1998), cert. denied, 525 U.S. 1071 (1999) 2

Virginia Military Institute v. United States, 508 U.S. 946 (1993) 3

STATUTES:

Electronic Communications Privacy Act of 1986, Pub. Law No. 99-508, 100 Stat. 1848 ..... *passim*

The USA PATRIOT Act, Pub. Law No. 107-56, 115 Stat. 272 (2001) 1

Wiretap Act (18 U.S.C. §§ 2510-2522), Pub. Law 90-351, 82 Stat. 212 ..... *passim*

18 U.S.C. § 2701(c)(2) 3

REPLY BRIEF

Aside from correcting the erroneous information supplied within Hawaiian's *Corporate Disclosure Statement*, this Reply Brief is necessary for the purpose of addressing and correcting three new points raised within the brief in opposition ("Pet. Opp.").

1. Hawaiian's opposition incorrectly portrays the admitted misconduct of its officer as a mere allegation. Pet. Opp. 1. Although Hawaiian uses the qualifier "allegedly," with respect to the communication facility access accomplished by its officer, this fact was undisputed in the district court. Pet. App. 3-4.

2. Hawaiian's opposition incorrectly portrays enactment of the USA PATRIOT Act as a reenactment of the Electronic Communications Privacy Act ("ECPA"). Pet. Opp. 4 and 7. Instead, the legislative history of the USA PATRIOT Act shows that this new legislation addressed immediate national needs with respect to uncovering terrorist activities. Hawaiian's cited precedent also does not apply.

3. Hawaiian's opposition incorrectly portrays the pending Petition as "interlocutory." Pet. Opp. 7-8. Although the court of appeals remanded the case for further proceedings consistent with its Opinion (Pet. App. 32-33), the Petition arises from a final order of the District Court. Supp. App. 2-3. The Opinion of the court of appeals is also final with respect to the Wiretap Act. Pet. App. 10-17.

ARGUMENT

There are three key reasons for which the pending Petition should be granted. First, this important question of law has never been decided by the Court. The ECPA is widely acknowledged to be a "complex, often convoluted, area of law" which is "famous for its lack of clarity." *Konop v. Hawaiian Airlines,* 236 F.3d 1035, 1042 (9th Cir. 2001), quoting; *Steve Jackson Games v. United States Secret Service*, 36 F.3d 457, 462 (5th Cir. 1994), and; *United States v. Smith*, 155 F.3d. 1051, 1055 (9th Cir. 1998). Second, the lower courts consistently note their confusion with respect to the proper application and interpretation of the ECPA (*Id.*). Finally, both the public's interests in communication privacy, and the needs of law enforcement in the administration of the law, require the Court's guidance. Pet. 25-30.

A. THE PETITION IS NOT INTERLOCUTORY

Hawaiian misidentifies the pending Petition as an "interlocutory" appeal. Pet. Opp. 7-8. This is incorrect. The pending Petition concerns the applicability of the *Wiretap Act* (18 U.S.C. §§ 2510-2520) to the acquisition of private electronic communications transmitted over the internet. Pet. 9. Both the district court and the court of appeals rendered final judgments in this regard. Pet. App. 17. Thus, given the finality of the decisions, the *Petition for a Writ of Certiorari* is proper and timely.

Further, Hawaiian wrongly asserts that a "consent exception" exists with respect to the scheme of misrepresentation undertaken by its vice president. That vice president used another person's name to seek access

authorization to Petitioner Konop's secure internet website. Pet. Opp. 8. However, based upon the undisputed facts, the court of appeals rejected Hawaiian's claim of a "consent exception." The court of appeals stated that Hawaiian's interpretation of this so-called exception "essentially reads the 'user' requirement out of [18 U.S.C. §] 2701(c)(2)." Pet. App. 20. Thus, the district court's judgment, with respect to Hawaiian's claimed "consent exception," was reversed.

Hawaiian's Opposition was similarly off the mark with respect to its case citation concerning interlocutory appeals. Pet. Opp. 7. In *Virginia Military Institute v. United States* (508 U.S. 946 (1993)), the Court noted that it would be unable to consider VMI's Petition where VMI sought review of the constitutionality of a proposed remedy which the lower courts had not yet fashioned (VMI, supra 946). By contrast, the pending case concerns a final judgment of the district court, and a final Opinion of the Ninth Circuit. The Petition seeks the Court's guidance with respect to the proper application and interpretation of the *Wiretap Act* (18 U.S.C. §§ 2510-2520).

B. THE OPPOSITION ASSUMES NON-EXISTENT FACTS

Hawaiian wrongly portrays the misconduct of its officer, as described within the Opinion of the Ninth Circuit (Pet. App. 3-4), as based upon that vice president's "alleged" actions. Pet. Opp. 1. However, in the district court Hawaiian admitted that its officer accessed Petitioner Konop's secure internet communications facility, and obtained the contents of private electronic communications through the use of a device. The key conduct, with

respect to application of the ECPA, was admitted. Pet. App. 3-4. There was no dispute concerning this *admitted* fact.

Hawaiian further assumes a fact which is incorrect and unsupported by the record. Hawaiian's Opposition wrongly states that "[t]wo Hawaiian pilots to whom petitioner supplied user names authorized a Hawaiian manager to log on to the site using their user names." Pet. Opp. 3. This purported fact does not exist, is unsupported in the record, and is not supported by the text cited within the Petition Appendix. Pet. App. 3-4.

Instead, the Opinion of the court of appeals correctly described the sequence of events, as were established by the record. Hawaiian's vice president used the name of a Hawaiian pilot, who had never seen or used Petitioner Konop's secure communications system, to wrongly obtain access authorization to Konop's secure internet website. Although the Hawaiian vice president's access was explicitly prohibited, he falsely indicated the agreement of that company pilot to an access and confidentiality contract. Pet. App. 3. As a result of this fraud, the Hawaiian vice president created his own "user name" and password to access Petitioner Konop's secure facility. (*Id.*). Hawaiian's Opposition misstates the record. Pet. Opp. 1.

In efforts to fashion a "consent exception," Hawaiian has also invented facts which do not otherwise exist. However, the court of appeals rejected Hawaiian's "consent exception" where the admitted facts ran contrary to the statute. Pet. App. 20. With respect to Hawaiian's claimed "consent exception," the district court's judgment was reversed by the final Opinion of the Ninth Circuit.

DISCUSSION

Much confusion emanates from intermixing the terms "access," "intercept," and "disclosure" within various interpretations of the ECPA. Pet. 9-10. However, Hawaiian has created additional confusion through its efforts to fashion a new "consent exception" where the court of appeals has already rejected Hawaiian's misapplication of alleged facts to the applicable statute. The Ninth Circuit's final Opinion ("*Konop II*") was clear that the admitted facts were not in synch with any exception provided by law. Pet. App. 20.

Although the Opposition dismisses guidance which the Court recently provided (Pet. Opp. 4), the Court's views with respect to differentiation between the "interception" of electronic communications and the "disclosure" of those communications have important correlations to the issues raised in the pending case. See: *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001). The Court was clear concerning the importance of properly distinguishing the terms provided within the ECPA (*Id.*).

Just as the terms "access," "intercept," and "disclosure" each describe distinctly different conduct, the facts considered by the Ninth Circuit clearly supported the appeals court's rejection of Hawaiian's claimed "consent exception" in this case. Such exception did not factually exist within the undisputed facts of record.

CONCLUSION

The Court's consideration of the pending Petition should be based upon the undisputed facts of record and the provisions of the applicable law. In this context, the public's interests would be served through grant of the *Petition for a Writ of Certiorari*.

Respectfully submitted,

ROBERT C. KONOP
Petitioner, Pro Se
P.O. Box 5065
Playa del Rey, CA 90296
Phone: (310) 305-2837